

**Bay Delta Conservation Plan
Governance Working Group
Preliminary Draft Recommendations for Governance Structure
January 29, 2009**

This is a progress report on the Governance Workgroup's discussion of governance structure. The workgroup will continue discussion on these provisions and adaptive management, over the next few weeks. We request comments and suggestions from other members of the Steering Committee.

Permittees

1. A permittee under Endangered Species Act (ESA) section 10(a)(1)(B), the NCCPA section 2835, and section 2081 of the California Endangered Species Act (CESA) is the non-federal entity authorized to incidentally take listed species for covered activities subject to the conditions stated in the BDCP. ESA section 7(a)(2) provides the basis for incidental take authorization for a federal entity. We use the term "permittee" to refer to the entity that receives such incidental take authorization under any of the foregoing regulatory processes for all or a portion of the BDCP covered activities, including water supply operations.¹
2. California Department of Water Resources (DWR) will be a permittee under Endangered Species Act (ESA) section 10(a)(1)(B) and NCCPA section 2835.
 - 2.1. The State of California, through DWR, will construct and own the new conveyance facility. *[See point 2.3 about the possibility of several state permittees.]*
 - 2.2. DWR will continue to own existing State Water Project (SWP) Delta facilities, including the Banks Pumping Plant.
 - 2.3. The plan will specify whether DWR will be the sole state permittee for the purpose of operating the new conveyance facility, or joint with another entity. *[As reflected below, Governance Workgroup continues to discuss (i) whether DWR will be the sole state permittee and (ii) responsibility for operations.]*
3. U.S. Bureau of Reclamation (USBR) will receive incidental take authorization under ESA section 7(a)(2).
 - 3.1. USBR will enter into an agreement with DWR to obtain capacity and other rights in the new conveyance facility.

¹ USBR representatives have stated that "permittee" is not an accurate description of USBR's status under ESA section 7(a)(2). The Governance WG will find mutually agreeable terminology as we develop Chapter 7.

- 3.2. USBR will continue to own existing Central Valley Project (CVP) facilities, including the Jones Pumping Plant.
4. A Joint Powers Authority (JPA) will be established by the SWP and CVP Contractors. *[The SWP and CVP Contractors and DWR continue to discuss whether DWR would be a member of the JPA, and whether the JPA itself could be a permittee. They expect to report back to the Governance Workgroup shortly.]*
 - 4.1. The JPA could assist in implementing habitat conservation measures and other plan elements.
 - 4.2. The JPA could be a permittee under ESA section 10(a)(1)(B), NCCPA section 2825, or CESA section 2081, or it may receive regulatory coverage as specified in the BDCP and its implementing agreement. *[DWR and the contractors will continue to discuss and report back to the Governance Workgroup shortly.]*

Implementing Entities

5. NCCPA section 2820(b) provides: “A natural community conservation plan approved pursuant to this section shall include an implementation agreement that contains [specified elements].” This agreement specifies responsibilities of named entities for plan implementation. Similarly, an incidental take authorization under ESA section 7(a)(2), or a HCP, specifies responsibilities for plan implementation. We use the term “implementing entity” to refer collectively to such entities.
 - 5.1. An implementing entity may be a permittee for the purpose of plan implementation. It may be a contractor with a permittee, engaged to perform specified tasks in plan implementation. In the latter event, its take authorization is derivative of the permittee’s, and the permittee oversees its performance
6. At minimum, DWR will be an implementing entity under NCCPA section 2820(b). *[As stated above, Governance Workgroup continues to discuss whether DWR will be sole implementing entity for operations of new conveyance.]*
7. USBR will also have responsibilities for implementation as specified in the BDCP and associated incidental take authorization.
8. The Contractor JPA may be an implementing entity. The BDCP and the implementing agreement will specify its responsibilities. *[Governance Workgroup will discuss this further, once Contractors and DWR report the results of their discussion.]*

9. A Delta Conservancy, if established, may be an implementing entity for purpose of implementing habitat conservation measures. *[The Governance Workgroup continues discussion how to structure relationship between permittees and Delta Conservancy.]*
 - 9.1. In any event, Delta Conservancy will be able to accept public funds directly or through another State or Federal agency for implementation of specified measures in BDCP.
 - 9.2. Permittees will have authority to terminate Delta Conservancy's responsibilities under the implementing agreement, if they conclude that its performance does not comply with the plan or otherwise is insufficient. *[Governance Workgroup will discuss further consequence of non-performance related to portions of the plan funded by the State or Federal governments.]*
10. Other public agencies and private entities may also be implementing entity under the same logic described in point 9.

BDCP Implementation Council

11. Stakeholders will participate in an Implementation Council to consult with the permittees, any other implementing entities, and regulatory agencies in the implementation of the plan.
12. As specified in the plan and implementing agreement, members will include: (i) members of the existing Steering Committee who support the plan, (ii) the Delta Counties, and (iii) other stakeholders whose assistance will increase the likelihood of success in implementation.
13. The Implementation Council will have two functions: oversight and dispute resolution. *[Governance Workgroup continues to discuss both functions. As to the first, how should consultation occur to assist (rather than conflict with) (i) permittees' obligation to perform timely and (ii) regulatory agencies' authorities to assure compliance with take authorizations? As to the second function, how should non-binding dispute resolution be structured (i) to have a reasonable prospect of success and (ii) advance, not prejudice, the interests of the participants? Generally, the workgroup will continue to discuss whether these functions would add value to plan implementation, and if so, how to optimize such value.]*
14. The implementing entity(ies) will periodically report to council members on past activities and upcoming plans. They will consider member's comments and recommendations. The plan will establish, and the Implementation Council will use, reporting (including meeting) procedures which are timely and efficient. Such procedures may vary by plan element.
15. The plan will establish, and the Implementation Council will use, non-binding procedures for dispute resolution between the permittees and council members. Such disputes will

concern sufficiency of plan implementation, including the performance of adaptive management. The plan will specify such procedures, and the Implementation Council will use them, to minimize the risk and scope of litigation related to plan implementation.

16. Such oversight and dispute resolution procedures will fully preserve the existing authorities of any member, including regulatory agencies, to act as required by such authorities. The agencies will not delegate any such authorities to the Implementation Council.
17. Such procedures will comply with applicable requirements of open meeting laws.

Regional Governance

18. The plan will contain appropriate provisions to reconcile governance for the purpose of plan implementation with regional governance adopted pursuant to the recommendations of Delta Vision or otherwise.